Criminal Defense Attorneys of Michigan

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July 27, 2010

Mr. Corbin R. Davis, Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2009-19

Dear Mr. Davis:

I am writing, on behalf of the Rules and Laws Committee of the Criminal Defense Attorneys of Michigan, to offer comment on and to oppose the portion of ADM File No. 2009-19 that would add a new MCR 6.502(H), and thereby impose a one-year statute of limitations for criminal defendants filing motions for relief from judgment ("6500 motions"). For nearly a quarter of a century I directed the Lansing office of the State Appellate Defender. During that period I filed a substantial number of postconviction motions. Since entering private practice in 2002, I have filed dozens of MCR 6.500 motions in retained and pro bono cases. I have presented on the subject of MCR 6.500 filings for the Michigan Judicial Institute. CDAM strongly urges that this Court refrain from adopting a one year time limit for seeking relief under MCR 6.500. CDAM agrees with the comments previously provided to this Court by attorney Stuart Friedman.

The impact of this change will be felt by the poor. Those with money will be able to timely engage the services of knowledgeable attorneys to protect their rights. The vast majority of our prison population is indigent and uneducated, and many are beset by severe physical and mental problems, including mental retardation, mental illness and drug and alcohol addiction, conditions that make timely filing without assistance virtually impossible. Competent legal assistance is not readily available to the poor who are incarcerated in this state.[1] In some instances, after many years, inmates, through good fortune or coincidence, may obtain the ability or the resources to adequately present a postconviction attack. They should not be cut off from the ability to seek justice on the basis of a technical time limit.

[1] Many CDAM practitioners who handle appellate and postconviction work do give of their time in a *pro bono* capacity, though each of those who do will attest that the demand far outstrips the available time.

If this Court does impose a time limit, the incredibly adverse impact on the poor, the uneducated, and the mentally challenged could be limited by doing what Pennsylvania does – provide counsel. In Pennsylvania the impact of a one year time limit is mitigated somewhat by the opportunity to have counsel investigate and file an amended petition. In that state a prisoner has one year from conclusion of direct appeal to file a pro se petition. Forms are readily available in prison libraries. Filing the pro se petition satisfies the statute and stops the clock (as well as the AEDPA clock). On a first petition, the trial court must appoint counsel and give counsel time to investigate and file an amended petition. Pennsylvania has recognized that a strict statute of limitations is only appropriate where the right to counsel is provided.

It should be noted that the federal habeas process interposes a *de facto* time limit on Michigan postconviction work. This is so because a key purpose of timely postconviction activity in Michigan is preserving federal issues not raised on direct appeal, or federalizing issues raised but not exhausted for federal court. While state postconviction activity tolls the one year time limit under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[2] such activity must be engaged within one year of the end of direct review in order to keep federal habeas possibilities alive. The point is that those with resources and ability will not be impacted by the proposed one year limit on Michigan postconviction filing under MCR 6.500 because they will likely be filing within the one year AEDPA time limit.

Several years ago this Court imposed a critical restriction on 6.500 filings by criminal defendants. Pursuant to MCR 6.502(G), after August 1, 1995, only one postconviction filing can be done. Severe restrictions on successive MCR 6.500 actions are in place, thereby substantially reducing the need to restrict the poor and mentally challenged even further by imposing a technical time limit.

Several other states have recognized the impropriety of putting deadlines on the ability to petition for relief.[3] Other states, though carrying limits, recognize that one year is too short.[4] Still other states allow for exceptions to the timing requirements that somewhat limit the damage to the ability to redress severe injustice.[5] Texas, which does carry a time limit for capital cases, but not for all others, allows for filing at any time in capital cases if successive petition conditions are met.[6]

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[2] Pub L No 104-132, 110 Stat 1213 (codified, inter alia at 28 USC 2244 et seq.)

[3] New Mexico, Rule 5-802 NMRA 2003; Colorado 16-5-402 CRS (for life offenses; Colorado has a three year time limit on all other felonies, except for death cases); California (habeas procedures); Indiana, PCR 1(1)(a). Indiana, while not carrying a time limit, does allow the prosecution to argue laches if it can be shown that the petitioner unreasonably delayed (knew about rights but did not pursue) and the delay would substantially prejudice the prosecution. See *Armstrong v State*, 747 NE2d 1119, 1120 (Ind. 2001).

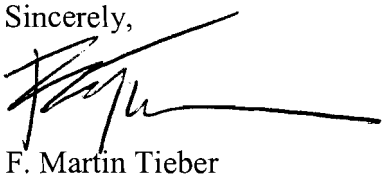
[4] Louisiana, C.Cr.P. art. 930.8 (2 years); New Jersey, NJ CR 3:21-12(a) (5 years).

[5] Actual innocence (Illinois, 725 ILCS 5/122-1); Non-culpable negligence (excusable neglect) (New Jersey, NJ CR 3:21-12(a); Illinois, 725 ILCS 5/122-1); Interference by government officials (Pennsylvania, 42 PACSA 9545(b)).

[6] Texas Code Crim Pro art. 11.071.

The mechanistic and inflexible time limit proposed here will severely restrict the ability of the poor to seek redress for injustice. Given the present ban on successive motions unless there is a claim of new evidence or a retroactive change in the law, an inflexible time limit is not necessary for docket control. CDAM urges this Court to reject the one year time limit. If this Court is determined to limit the ability of the poor to seek justice, CDAM urges that the limit be made more flexible by adoption of exceptions for government interference, excusable neglect and actual innocence (see footnote 5, *supra*). Finally, if a time limit is adopted, CDAM urges this Court to allow for a grace period permitting filing, during the time limit adopted, by all prisoners currently convicted and incarcerated, measured from the time of adoption of the limit as Congress did when adopting the AEDPA one year limit in 1996.

Sincerely,



F. Martin Tieber
CDAM Rules and Laws Committee